IN THE HIGH COURT OF JUDICATURE OF ANDHRA PRADESH
AT HYDERABAD

HON'BLE THE ACTING CHIEF JUSTICE SRI BILAL NAZKI
AND
HON'BLE SRI JUSTICE NOOTY RAMAMOHANA RAO

W.P. No. 18985 of 2005

Between :

Oil and Natural Gas Corporation Ltd.,
Rajahmundry Asset
(Formerly known as KG Project)
Base Complex, Rajahmundry,
East Godavari District rep. By its
General Manager (P&A) .. Petitioner

And

Pennamaneni Appaji and another .. Respondents

JUDGMENT : (per NRR,J)

This writ petition has been instituted to declare the order passed by the learned District Judge, East Godavari at Rajahmundy in Arbitration Application No. 3 of 2000 as illegal and without jurisdiction and to set aside the same. The 1st respondent herein has filed Arbitration Application No. 3 of 2000 seeking for appointment of an Arbitrator for resolving the disputes that have arisen between the petitioner and the1st respondent. It is the case of the 1st respondent that he entered into a contract with the writ petitioner – Oil and Natural Gas Commission (ONGC), a public sector undertaking on 24.9.1993. During the currency of the contract, there was a revision of minimum wages notified by the State Government on 25.7.1995. Since these revised minimum wages have not been paid for, the 1st respondent has taken up the matter with the writ petitioner. Clause XV of the contract had provided for the redressal mechanism. The relevant portion of Clause XVreads as under :

"It is also a term of this contract that no person

other than a person appointed by the Head of K.G. Project, Rajahmundy as aforesaid should act as Arbitrator and if for any reason it is not possible, the matter is not to be referred to Arbitrator at all."

In response to the claim made by the 1st respondent, the writ petitioner – ONGC through their letter dated 5.11.1997 have informed the 1st respondent as under :

"To Dt : 5.11.1997
Sri P.Appaji,
Rajahmundry

Sub: Job contracts of intermittent nature of KG Project–Appointment of Arbitrator

: :

Dear Sir,

Your attention is drawn to the Clause No.XV of the contract agreement entered into between ONGC and you for referring to arbitration in case of any dispute/disagreement in execution of the contract.

The Management of ONGC, SRBC, has agreed for reference of the matter regarding enhancement of contractual rates for arbitration in respect of one of the contracts, who had requested the Management to invoke the clause of arbitration as per the contract pursuant to the revision of the minimum wages by the Govt. of Andhra Pradesh with effect from October, 1995. Similarly, your claim for enhancement of contractual rates will also be referred for arbitration.

This issues pursuant to the discussions had from time to time with the Management of ONGC. Further communication in this respect shall follow.

Yours faithfully,
Sd/-
Admn. Officer (P&A)-JC
for Head of P&A"

Contrary to the promise held out therein, the dispute has not been referred for resolution through the mechanism of arbitration. Therefore, the 1st respondent had put the petitioner corporation on notice on 15.8.1999 demanding the matter to be referred for adjudication by the competent

arbitrator. Finding no response thereto, the 1st respondent had instituted the Arbitration Application No.3 of 2000, which is contested by the petitioner. The learned District Judge had decided the matter, the operative portion of which reads as under :

> "11. Therefore, for all the above reasons, I find on the point that an Arbitrator is liable to be appointed in terms of the agreement between the parties to decide the dispute between them.
> 12. In the result, the petition is allowed with costs directing the respondents to appoint an Arbitrator in terms of 1st para of Clause XV of the contract dated 24.9.1993 within one month from today; and in default, this court will name an arbitrator on a memo to be filed by the petitioner about non-appointment of arbitrator by the respondents within the due date."

It is this order which is the subject matter of challenge in this writ petition.

Heard Sri E.Manohar, learned Senior Counsel for the writ petitioner and Sri G.Krishna Murthy, learned counsel for the 1st respondent.

Learned Senior Counsel contends that when once a specific procedure had been contemplated and provided for securing the appointment of an Arbitrator and if the Arbitrator has not been appointed in terms thereof by the petitioner – corporation, it shall be construed that the matter is not to be referred to Arbitrator at all and hence the learned District Judge has erred in entertaining the arbitration application. Learned Senior Counsel would place strong reliance upon a judgment rendered by the Supreme Court in **A.Mohammad Yunus (Dead) By LRs v. Food Corporation of India**[1] and contended that the court has no jurisdiction to appoint an Arbitrator contrary to the procedure contemplated in the contract entered into by and between the parties. On the contrary, the learned counsel for the 1st respondent would submit that that the order passed entertaining an application for appointment of an Arbitrator is no longer an administrative order and consequently it does not warrant interference in exercise of power available under Article 226 of

the Constitution and the said order is an appealable order, as was held by the Supreme Court in **M/s. S.B.P. and Co. v. Patel Engineering Ltd.**[2] had held that that the order passed under Section 11 or declining to entertain an application under Section 11 of the Act has got to be challenged only by way of an appeal since it has overruled its earlier view expressed with regard to the nature of orders passed under Section 11, set out in **Konkan Railway Corporation Limited and another v. Rani Construction Pvt. Ltd.**[3]. On merits, he pleads that all that the learned District Judge did was to order the petitioner herein to follow the procedure contemplated by the contract in referring the dispute to Arbitration.

The controversy involved in this case is in a narrow compass. The writ petitioner corporation has not disputed the existence of a contract between it and the 1st respondent. It also did not dispute that Clause XV of the said contract had provided for an adjudicating mechanism for resolution of the disputes between them. Clause XV of the contract provided for the procedure for securing the resolution of disputes through the mechanism of Arbitration. That portion of clause XV of the Contract, extracted supra, makes the position abundantly clear that no person other than a person appointed by the Head of the K.G. Project, Rajahmundy should act as Arbitrator. Therefore, there is an exclusive power available with the Head of the KG Project, Rajahmundry of the Corporation to appoint an Arbitrator. The later portion of clause XV, that "if for any reason, it is not possible, the matter is not to be referred to arbitration at all", is a condition which is to be read along with the first part of the clause requiring the appointment of an Arbitrator by the Head of the KG Project, Rajahmundry. They cannot be read as independent limbs. The latter portion of the clause is only qualifying the 1st part of the clause which prescribed the authority to appoint an Arbitrator in the hands of Head of the "K.G.Project, Rajahmundry". Therefore, the parties to the contract viz., ONGC, the petitioner herein and the 1st respondent have intended the matter to be placed before the Head of the K.G. Project at Rajahmundry who will undertake a study of the dispute which is sought to be resolved by and

between the parties and if he is satisfied that there is an existence of a genuine dispute between the parties in working out the contract, such a dispute is then liable to be resolved through the mechanism of arbitration duly appointing an Arbitrator for that purpose. The latter portion of the clause therefore empowers and requires the Head of the KG Project, Rajahmundy to apply his mind to all relevant and necessary factors. He cannot act whimsically to choose in favour of some parties to refer the disputes for resolution through the mechanism of arbitration and in certain other cases, notwithstanding the merits of the matter, decline to do so. For instance, if two separate contractors have been awarded by the writ petitioner to perform similar or identical nature of contracts and should similar or identical nature of disputes arise while working out these two separate contracts, the Head of K.G. Project, Rajahmundry by virtue of the power available to him under Clause XV cannot agree to refer the disputes with regard to one contract for adjudication through the process of arbitration and in the other case decline to refer the same for adjudication through arbitration at all. Such an exercise of power borders on irrationality. Every contract and every term thereof is intended to be given certain specified purpose for working out the contract. It is not intended to defeat or frustrate the contract itself. After all, the contract is the net result of meeting of minds between two separate parties.

As is demonstrated in the present case, on behalf of the writ petitioner – corporation a communication was addressed on 5.11.1997 by it's Administrative Officer agreeing to have the dispute resolved through the mechanism of arbitration. Having thus held out an unequivocal assurance to have the dispute resolved through the process of arbitration, it is not open to the petitioner later on to resile therefrom. It is a well settled principle of law that no party should be permitted to blow hot and cold simultaneously. Such conduct is considered to be an irrational conduct. Therefore, we have no hesitation to hold that Clause XV of the contract in it's enterity has to be read and no clause thereof should be read in isolation. We further feel that clause XV does not give absolute power to the Head of K.G. Project, Rajahmundry to act whimsically either in appointing or declining to appoint an arbitrator.

The trust reposed by the parties in his objective approach and ultimate judgment is the insulation against capricious conduct on his part. Therefore, even without there being any decision taken by the Head of the K.G. Project, Rajahmundry of the O.N.G.C., it cannot be assumed that the dispute is not liable to be referred to Arbitration at all.

The Supreme Court had occasion to deal with a clause somewhat similar in nature to the clause with which we are concerned in **Mohd. Younus** case (supra 1). In that case, contrary to the scheme of appointment of Arbitrator by the Food Corporation of India, a different Arbitrator was appointed who passed his award, which award has also been made the Rule of the Court by the learned Subordinate Judge at Trivandrum. On appeal, the Division Bench of the Kerala High Court had held that no other Arbitrator, other than the one provided in the contract, could have been appointed in view of the specific terms and procedure, for securing such appointment, contained in the contract in that regard. Therefore, the award made by the Arbitrator was considered as to have been made by a *quorum–non-juris.* On appeal, the Supreme Court upheld the judgment of the Kerala High Court. The principle that emerges from the above case is that, the procedure contemplated by the contract had to be strictly followed for securing the appointment of an Arbitrator and no other Arbitrator can be appointed.

In the instant case, the learned District Judge has not appointed any other Arbitrator by himself. He has merely directed the Arbitrator to be appointed strictly in accordance with Clause XV of the contract entered into by and between the parties. Therefore, the principle laid down by the Supreme Court in **Mohd. Younus case (supra 1)** had no application to the facts and circumstances of the present case. In fact, the principle that the mechanism provided in the contract for securing appointment of an Arbitrator should not be discarded has been well recognized in Section 11 of the Arbitration and Conciliation Act, 1966 (henceforth referred to as 'the Act'). Sub-section (2) of Section 11 of the Act has specifically set out that the parties are free to agree on a procedure for appointing the Arbitrator or

Arbitrators. That is a choice left to the parties. The parties are at liberty and are at full freedom to choose on a specified procedure for securing the appointment of an Arbitrator. In the instant case, the parties have agreed in Clause XV to have an Arbitrator appointed for resolving the disputes that have arisen amongst them by the Head of KG Project, Rajahmundry. Sub-section (6) of Section 11 comes into operation only where the person fails to perform any function entrusted to him under that procedure. In the instant case, therefore the need to entertain the arbitration application had occasioned because of the failure of the writ petitioner to place the matter before the Head of KG Section, Rajahmndry for him to appoint an Arbitrator. Clause XV in question is therefore completely in consonance with the general principle which recognized the freedom of the parties to choose a specified and particular procedure for securing appointment of an Arbitrator. The same cannot be read to mean as vesting power in the hands of one of the two parties to the contract not to follow the procedure for securing such an appointment at all. We therefore do not find any merit in the contention canvassed by the writ petitioner. Carried to its logical conclusion, the writ petitioner cannot be permitted to take advantage of its own conduct by declining to approach the Head of the KG Project, Rajahmundry to appoint an Arbitrator for resolution of the disputes amongst the parties. The contention therefore canvassed that the District Curt did not have jurisdiction to entertain the Arbitration Application is without any merit.

For these reasons, the writ petition is devoid of merit and it is accordingly dismissed.

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ACTING CHIEF JUSTICE BILAL NAZKI

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JUSTICE NOOTY RAMAMOHANA RAO,J

31st December 2007
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[1] 2000(7)Supreme 722

[2] 2006(1) ALD 10(SC) : 2005(1) Decisions Today (SC) 105 (LB)

[3] (2000) 8 SCC 159